IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.02.2007

CORAM:

THE HON'BLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.928 of 2006

Nahar Enterprises
Represented by its partner
J.Bherulal Nahar
No.89 Godown Street
Sowcarpet, Chennai - 600 001. .. Appellant
[Plaintiff].

-Vs-

1. The Chairman
   Tamil Nadu Electricity Board
   Anna Salai, Chennai.

2. The Assistant Executive Engineer
   CEDC/CENTRAL/Sowcarpet
   No.23 Malaiyappan Street,
   Sowcarpet, Chennai - 600 001.

3. The Assistant Executive Engineer
   Operation and Maintenance
   Tamil Nadu Electricity Board
   Chennai Division, Sowcarpet,
   Chennai - 600 001. .. Respondents.
   [Defendants].

Appeal filed under Section 100 CPC against the decree and judgment passed in A.S.No.422 of 2005, dated 23.02.2006 on the file of the III Additional Judge, City Civil Court, Chennai, confirming the decree and judgment passed in O.S.No.1474 of 2003, dated 16.02.2005, on the file of the XIV Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr. M.L.Ramesh.

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J U D G M E N T

The plaintiff in O.S.No.1474 of 2003 on the file of the XIV Assistant Judge, City Civil Court, Chennai, who has lost the suit and the appeal filed therefrom has filed the above second appeal.

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2. For the sake of convenience, the parties are referred to as arrayed in the suit.

3. The brief facts that are necessary for the disposal of the above second appeal as culled out from the plaint are set out below:-

The plaintiff has been provided with two electricity service connection meters, bearing service connection Nos.152:01:1273 and 152:01:1274. In said meters, Service Connection No.152:01:1274 became defective and a complaint was lodged on 26.06.2001, but the defective meter was not at all replaced. On 03.05.2002, at about 1.00 pm, the third defendant inspected the said defective service connection meter, without giving any notice of inspection and theft of electrical energy was alleged. The complaint given by the plaintiff to change the meter was not accepted. The third defendant insisted for the payment of compounding charges and therefore the plaintiff under protest paid a sum of Rs.1,19,655/- on 04.05.2002 by way of two cheques to avoid disconnection. The defective meter was not sent for testing and therefore there was non-observance of the procedure. There was no theft of electrical energy and hence the plaintiff issued a legal notice on 16.12.2002 requesting the defendants to refund the amounts. Since there was no response, the suit has been filed seeking declaration to declare the levy of penalty for alleged electrical energy theft in service connection No.152:01:1274 in the name of the plaintiff dated 03.05.2002 as null and void and to declare that the plaintiff is not liable to pay the compounded fine amount of Rs.1,19,655/- to the defendants and for a mandatory injunction to direct the defendants to adjust the compounding charges collected from the plaintiff to the tune of Rs.1,19,655/- towards future electricity consumption charges for service No.152:01:1274 with the second defendant.

4. The suit was contested by the defendants by filing a detailed written statement inter-alia contending as follows:-

The suit is not maintainable as there is no provision in the Electricity Act as well as in the Terms and Conditions of Supply of Electricity of Tamil Nadu Electricity Board for adjustment of the amounts paid by the plaintiff. As the plaintiff had committed theft of electrical energy, he paid the compounding charges to avoid criminal prosecution. Having attempted theft of electrical energy and having paid the compounding fees, the plaintiff is estopped from raising a contrary plea. At the time of inspection of the electricity service connection of the petitioner, the required formalities were observed and it was found that the supply was drawn directly bye-passing two out of three electric phase meter and thereby avoided a consumption assessment. Pursuant to the inspection, the plaintiff voluntarily came before the defendants on the next day itself and expressed his willingness to pay the loss sustained by the Board and as well as agreed to pay the compounding charges to avoid criminal prosecution and there was no compulsion or pressure exerted on

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the plaintiff. At the request of the plaintiff only, the consumption charges was made expeditiously and the loss was assessed at Rs.60,566/- and the compounding charges were arrived at Rs.59,089/- and the same was paid by the plaintiff on 04.05.2002 itself by way of two cheques. The defendants specifically pleaded that the suit is not maintainable.

5. The Trial Court framed the following issues:-

> "1. Whether the penalty levied dated 03.05.2002 to the service connection No.152:01:1274 is null and void?
>
> 2. Whether the plaintiff is entitled for a declaration as prayed for?
>
> 3. Whether the plaintiff is entitled for a mandatory injunction as prayed for? and
>
> 4. That what relief is the plaintiff entitled?"

6. During Trial, one witness was examined on the side of the plaintiff and Exs.A-1 to A-9 were marked. On the side of the defendant, one witness was examined and no documentary evidence was marked. The Trial Court on a careful consideration of the evidence on record has found that the plaintiff had no valid explanation for connecting R & B phases directly bye-passing the meter. The Trial Court has also found that the plaintiff had paid the compounding charges for theft of electrical energy and the contention of the plaintiff that he paid the amounts only under protest is only an after thought. The Trial Court has also pointed out that the plaintiff had admitted in his evidence that against the order passed by the second defendant no appeal had been filed. After recording such findings, the Trial Court dismissed the suit. Being aggrieved by that, the plaintiff filed an appeal in A.S.No.422 of 2005 before the III Additional Judge, City Civil Court, Chennai, but the appeal also was dismissed. Being aggrieved by that, the above second appeal has been filed.

7. Heard Mr. M.L.Ramesh learned counsel appearing for the appellant.

8. The learned counsel for the appellant submitted that the Lower Appellate Court is not correct in holding that when an appeal is provided for under the Act, the suit is not maintainable, since it is contrary to the law laid down in the decision reported in 2004 (1) Law Weekly 810 (Union of India and others Vs. Vasantha Carbide Company Limited, Karaikal). The learned counsel further submitted that the finding of the Courts below that the plaintiff is estopped from agitating the issue after having paid the compounding fee and the penalty charges is erroneous, since the plaintiff had paid the said amounts under protest and without

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prejudice to his right. Apart from the above submissions, no other submissions were made by the learned counsel for the appellant.

9. I have carefully considered the above submissions made by the learned counsel for the appellant and the materials available on record.

10. At the out set, it has to be pointed out that there is no dispute regarding the inspection of the plaintiff's electricity service connection No.152:01:1274 by the Anti Power Theft Squad at 01.00 pm on 03.05.2002 and all the formalities required for inspection were also followed. The contention of the plaintiff is that prior to inspection, no notice was issued and he was coerced and pressurised to pay the compounding fees and penal charges. The further contention of the plaintiff is that the said amounts were paid under protest and without prejudice. Both the Courts below, on a consideration of the legal evidence on record, have found that the contention of the plaintiff that the compounding fee and assessment charges were paid under protest is only an after thought and there is absolutely no material to prove the same. When both the Courts below have recorded such a concurrent finding, this Court cannot interfere with such concurrent findings while exercising power under Section 100 of the Code of Civil Procedure and especially when no evidence whatsoever has been adduced by the plaintiff to show that the said payments were made under protest and without prejudice. Therefore, the said submission of the learned counsel for the appellant is liable to be rejected.

11. The contention of the learned counsel for the appellant that the inspection is vitiated for want of prior notice is liable to be rejected in the threshold itself since if prior notice is to be issued before conducting surprise inspection by the Anti Power Theft Squad, the very object and purpose of inspection will be lost. Therefore the above contention is devoid of merits and liable to be rejected and accordingly rejected.

12. The next point to be considered is the very maintainability of the suit. The learned counsel for the appellant by basing reliance upon the decision of a Division Bench of this Court reported in 2004 (1) Law Weekly 810 (referred to supra) submitted that the suit is maintainable. In the said decision, in paragraph 14, the Division Bench has observed as follows:-

> "Learned Special Government Pleader, Pondicherry, appearing for the appellants/defendants submitted that the suit is not maintainable as the respondent/plaintiff is having effective alternative remedy against the impugned action of disconnection of power supply. Here also, as rightly submitted by the learned Advocate General, the remedy of

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filing Appeal is provided only against the order of assessment of extra levy and not against disconnection of power supply. It is also submitted that an Appeal was preferred against the order of assessment, with which we are not concerned in this Appeal. Learned Special Government Pleader further relied on the decisions in (1997) 5 S.C.C. 120 and JT 2003 (Supp.1) S.C. 291, (Supra) in support of his submission that if alternative remedy is available, the suit cannot be sustained. As stated earlier, against the disconnection of power supply, no Appeal is provided under the terms and conditions. But, Appeal is provided only against the order of assessment of extra levy. So the said argument of the learned Special Government Pleader that the suit is not maintainable cannot be countenanced".

13. To appreciate the contention of the learned counsel for the appellant based on the above said decision, it is necessary to refer to the provisions contained in Section 9 of the Code of Civil Procedure and relevant provisions contained in the Terms and Conditions of Supply of Electricity of Tamil Nadu Electricity Board.

14. In the considered view of this Court, the legal position on the question of maintainability of Civil Suits in such matters is fairly well settled. Section 9 of the Code of Civil Procedure contains a provision regarding right of a party to file a civil suit. The same is reproduced as under:

"9. Courts to try all civil suits unless barred- The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a Civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation I - A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation II – For the purpose of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place."

15. The opening words of the section give a very wide jurisdiction to the Civil Courts to try all suits of a Civil nature however, this wide power is qualified by providing an exception i.e., "excepting suits of which their cognizance is either expressly or impliedly barred". Dhulabhai etc. Vs. State of Madhya Pradesh & Others reported in A.I.R. 1969 S.C. 78 is a celebrated judgment on the point which still holds the field. It lays down the following principles:

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"(1) Where the statute gives a finality to the orders of the special Tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
(2) Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statue creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.
(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.
(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.
(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.
(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a Civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.
(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

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16. It will be noticed from the provisions contained in Section 9 of the Code of Civil Procedure that a bar to file a Civil Suit may be express or implied. An express bar is where a Statute itself contains a provision that the jurisdiction of a Civil Court is barred. An implied bar may arise when a Statute provide a special remedy to an aggrieved party.

17. Now it has to be considered whether the Indian Electricity Act and the Terms and Conditions of Supply of Electricity of Tamil Nadu Electricity Board expressly bar the filing of the suit in such matters or whether they intend any implied bar. A perusal of the provisions of the Indian Electricity Act and the Terms and Conditions of Supply of Electricity of Tamil Nadu Electricity Board clearly show that there is no express bar for filing of a suit in such matters. Clause 37 of the Terms and Conditions contains a Schedule and Part I of the same contains Clause 8.00, which lays down the procedure to be followed for extra levy in case of theft of electrical energy. Clause 8.03 of the Terms and Conditions provides the procedure to be followed for making as to how the extra levy will be assessed in case of Low Tension Electricity Service Connections and High Tension Electricity Service Connections. A tabular column contained in Clause 10.01 of the Terms and Conditions enumerates the Officers Authorised to Inspect electricity Service connection, issue show cause notice, make assessment and function as an Appellate Authority. In cases of violation or theft of electrical energy in case of Low Tension Electricity Service Connection any Officer not below the rank of Junior Engineer Grade II is authorised to inspect the service connection, the Assistant Executive Engineer is the competent authority to issue the show cause notice, the Executive Engineer is the competent authority to make the assessment. As against the order of assessment an appeal is provided for to the Superintending Engineer. In case of High Tension Electricity Service Connection, any Officer not below the rank of Junior Engineer, Grade II, can inspect the service connection and the Executive Engineer is authorised to issue the show cause notice, the Superintending Engineer is the competent authority to make the assessment and as against the order of assessment an appeal is provided for to the Chief Engineer. Clause 11.01 of the Terms and Conditions provides as to how the appeal should be filed. Clause 12.00 of the Terms and Conditions lays down the procedure for disposal of such appeals and Clause 12.02 of the Terms and Conditions empowers the Appellate Authority to stay disconnection of electricity service connection. Clause 13.01 of the Terms and Conditions provides for the suo moto powers of the Chairman and it also provides that such order will be final. The above said provisions do indicate that the fundamental fairness of procedure has been prescribed. Therefore, by necessary implications, the cognizance of the civil cause has been excluded, as a result, the Civil Court will not entertain the suit and give the declaration without directing the party to avail the remedy provided under the Indian Electricity Act, Indian Electricity (Supply) Act and the Terms and Conditions of Supply of Electricity of Tamil Nadu Electricity Board.

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18. In the decision reported in 1997 (5) S.C.C. 120 (Punjab State Electricity Board and another Vs. Ashwani Kumar) the Apex Court, in paragraph 8, has held as follows:-

> "8. .... Section 9 of the CPC provides that the Civil Court shall try all suits of civil nature, subject to pecuniary jurisdiction, unless their cognizance is expressly or by necessary implication barred. Such suit would not be maintainable. It is true that ordinarily, the Civil Court has jurisdiction to go into and try the disputed questions of civil nature, where the fundamental fairness of procedure has been violated. The statutory circulars adumbrated above do indicate that a fundamental fairness of the procedure has been prescribed in the rules and is being followed. By necessary implication, the cognizance of the civil cause has been excluded. As a consequence, the civil court shall not be justified in entertaining this suit and giving the declaration without directing the party to avail of the remedy provided under the Indian Electricity Act and the Indian Electricity (Supply) Act and the instructions issued by the Board in that behalf from time to time as stated above".

The above said decision has been noted by the Division Bench in its judgment reported in 2004 (1) Law Weekly 810 (referred to supra), but has distinguished the same by observing that the remedy of filing Appeal is provided only against the order of assessment of extra levy and not against disconnection of power supply. In the instant case, the plaintiff is challenging the order of assessment of extra levy after making the payment. As pointed out above, an effective statutory remedy by way of an appeal is provided for in the Terms and Conditions, but as admitted by P.W.1 in his deposition, the plaintiff has not filed any appeal. It is not the case of the plaintiff that the fundamental fairness of procedure has been violated while passing the order assessing the loss of energy. The Terms and Conditions of Supply of Electricity of Tamil Nadu Electricity Board, as pointed out above, do indicate that the fundamental fairness of procedure has been prescribed therein. Even assuming that those procedures have not been followed the same can be brought to the notice of the Appellate Authority and if any violation is established the same will be considered and the grievance of the consumer will be addressed to by the Appellate Authority. Therefore, when an effective remedy of appeal is provided for as pointed out above and when the parties can further avail the remedy under Article 226 of the Constitution of India, it has to be held that the Civil Court's jurisdiction is impliedly barred as laid down by the Apex Court in 1997 (5) S.C.C. 510 (referred to supra).

19. It is not in dispute that in respect of theft of electrical energy a criminal case was registered against the plaintiff and on 04.05.2002, as rightly held by the Courts below, the plaintiff has voluntarily paid the compounding fees to avoid Criminal prosecution, and having avoided the

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Criminal prosecution, it is not now open to the plaintiff to seek a declaration as stated above. The plaintiff is estopped from seeking such a relief. Therefore the contention of the learned counsel for the appellant that the suit is maintainable is liable to be rejected. In the considered view of this Court, no question of law or much less any substantial question of law arises for consideration in the above second appeal and hence the above second appeal fails. However, the plaintiff is at liberty to avail the remedy of appeal before the competent Appellate Authority, only as against the assessment of loss of electrical energy is concerned. If any such appeal is filed by the plaintiff within a period of four weeks from the date of receipt of a copy of this judgment, the Competent Appellate Authority shall entertain the same without reference to the period of limitation prescribed therefor and dispose of the same on merits and in accordance with law without in any way being influenced by anything said by the Courts below in their judgment and by this Court in this judgment.

20. With the above observation, the second appeal is dismissed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

srk

To
1. The Registrar,
City Civil Court,
Madras.

2. III Additional Judge, City Civil Court, Chennai

3. XIV Assistant Judge, City Civil Court, Chennai.

+ 1 CC To Mr.G.Kumud Jhabakh, Advocate SR NO.7828

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